UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

DATE: December 5, 1997

CASE NO.: **96 INA 333**

In the Matter of:

COMPUTER CLINIC-GREAT LAKES MED. DIV.,
Employer

on behalf of

NASSER I. AL-ZAWAWI,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of NASSER I. AL-ZAWAWI ("Alien") by COMPUTER CLINIC-GREAT LAKES MED. DIV., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at Chicago, Illinois, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On December 1, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Programmer/Analyst" in the Employer's business of computerizing medical offices. AF 40. This job was classified as Programmer Analyst under DOT Occupational Code 030.162-014. The Employer's Special Requirements were a college education with a baccalaureate degree in computer science and engineering plus experience of six months in the Job Offered or six months in the Related Occupation of Programmer/Analyst. In addition, the Employer required six months of experience with Medical Manager software and SCO Unix. The Job to be Performed was as follows:

> Setting up and designing computer networks for doctors' offices to their specifications, including integrating advanced technology and hardware, installing and configuring operating systems for SCO Unix/Xenix and DOS as well as installing application programs according to client needs; custom report writing and data merge programs for Medical Manager software; trouble shooting both by telephone and on site; and analyzing existing and proposed systems for alterations.

AF 40. (Original is quoted without correction.)[3]

Notice of Findings. On the October 4, 1995, the CO's Notice

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[2]Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The job was to be forty hours a week at $29,450 a year, with no overtime contemplated, with daily hours from 8:30 A.M. to 5:30 P.M. The title, hours, experience, Other Special Requirements, and Job to be Performed were amended in accordance with Employer's letter of April 14, 1995. Although the job title was changed to "Programmer/Analyst," the position was posted and advertised as "Systems/Analyst," however. AF 26-31 This letter was made a part of Employer's rebuttal and was considered in the CO's Final Determination.

of Findings ("NOF"), the denied certification, subject to the Employer's rebuttal. 20 CFR § 656.25(c). As the record that was transmitted by the State Employment Service was insufficient for the disposition of this application, the CO also considered the results of a further investigation of this application by the U. S. Department of Labor. The CO noted that 20 CFR § 656.21(b)(5) requires the Employer to establish that its requirements for the position described represent its actual minimum requirements to perform the job duties, that it has not hired workers with less training or experience for this position or similar jobs, or that it is not feasible for Employer to hire workers with less training or experience than it required in its job offer. The CO also said that under 20 CFR § 656.21(b)(2)(i) Employer the must prove that it has described the position without unduly restrictive job requirements, and that its job requirements are those normally needed in the United States for the position as defined in the DOT.[4]

Noting that the Employer was offering a job for a Programmer/Analyst and its requirements of education and experience, the CO said it appears that the Alien gained his six months of experience while working for the Employer, which was contrary to these regulations. This summarized the CO's review of the application, which led the CO to find that the Employer had trained the Alien, who was initially hired by the Employer with skills that are inferior to those it now specifies for the position offered. The CO concluded in the NOF that, although the Employer had trained the Alien in the skills requisite to the position offered, it now required U. S. workers to provide the skills that the Alien had acquired while in its employ without offering the U. S. workers the same opportunity to be trained for this job that it had afforded to the Alien. The CO then stated the proof that the Employer must offer in rebuttal and the steps its must take to remedy the deficiency noted. AF 33-34.

Rebuttal. The Employer's November 3, 1995, rebuttal addressed the issue stated in the NOF. AF 23- 31. Employer attached its letter of April 14, 1995, in which it had represented that

> Mr. Al-Zawawi was hired as a field technician at Computer Clinic based upon his education, experience and interpersonal skills. He quickly learned the skills necessary to work with Medical Manager [software]. His interpersonal strengths and quick learning of the [Medical Manager software] program allowed him to advance in position at our company. This advancement took place over a period

[4]The regulation also requires that the job requirements do not require facility in any language other than English, which is not an issue in this case.

> of a year and a half which is evident from his work history as noted in part B of the Labor Certification application. He did not enter the position of Programmer/Analyst without gaining experience in Medical Manager [software].

AF 30. In its rebuttal, however, the Employer later contended that,

> Mr. Al-Zawawi was **not** trained by our company for the job advertised. He was employed in a much different position wherein he acquired some knowledge of Medical Manager [software], but certainly not enough to perform the job to be certified.

AF 23. (Emphasis as in original.) The Employer emphasized that the Alien was hired at an entry level position, where he worked with Medical Manager software for seven months before being promoted to Systems Analyst. After working in that position for another eleven months, he was promoted to the position of Programmer/Analyst in April of 1994. The Employer pointed out that, "Another person with such extensive knowledge of Medical Manager[software] **could** have been hired in as a Programmer/ Analyst." Referring to the workers hired as field technicians and as systems analysts at the same time as the Alien, the Employer observed that, "These other employees were not promoted as Mr. Al-Zawawi was because they did not master the Medical Manager software to a level sufficient enough to perform the job of programmer/analyst." This, the Employer argued inter alia, showed that the Alien gained the knowledge of Medical Manager software while performing other duties with our company. AF 23-24. (Emphasis as in original.)

Final Determination. On February 15, 1996, the CO's Final Determination denied certification on grounds that the Employer had failed to state its minimum requirements for the job within the meaning of 20 CFR § 656.21. The CO said that the Employer was required either to establish that the Alien had met its experience requirement before he was hired by the Employer or to delete the offending requirement and readvertise the job offer.

The CO noted that the Alien worked for Employer part time as a Field Technician from November 1992 to June 1993, when he was promoted to Systems Analyst, a position in which he remained from June 1993 to April 1994. Finally, in April 1994 the Alien was promoted to Programmer/Analyst, which is his present job. Reflecting on the changing duties of the Alien as these jobs succeeded each other, the CO said the evidence strongly indicates that he was trained by the Employer, since the duties from June 1993 to April 1994 appeared identical to the Alien's duties from April 1994 to the date of application. The CO remarked,

> It appears that the difference in the two [positions from June 1993 to April 1994 and from April 1994 to the present company positions] is that the longer the alien works for the company the more advanced he becomes. The duties of the alien at the time of hire appears basic to the occupation of Field Technician. Yet, when the alien progressed to Systems Analyst he began to acquire the knowledge of Medical Manager [software].

AF 22.[5] The CO then concluded that the Employer failed to prove that the Alien had gained the requisite six months of work experience with Medical Manager software and SCO Unix before the Employer hired him.

Appeal. The Employer's letter of March 20, 1996, set forth arguments supporting its appeal, all of which have been noted and considered. AF 01-05.

Discussion

The Employer's appeal presents an issue that requires the Employer to establish that the job for which the Alien was first hired was distinctly different from the position at issue. The Rebuttal and the Final Determination discussed above indicate that the CO in this case duly considered the factors discussed in **Delitizer Corporation of Newton**, 88 INA 482 (May 9, 1990)(en banc), in reaching a decision. The Employer addressed this holding by arguing in substance that, while the Alien was working for the Employer when he gained the experience requisite to his promotion to the position at issue, his critical experiential exposure was not necessarily concomitant with the work he was then performing. In support of this the Employer argued at length that the Alien's unique qualities of character and diligence drove him to learn better and more than others who were his peers at the time he was hired as an entry level employee. Said the Employer,

> Not every entry level technician has been able to advance to this level. Not every entry level technician acquires the knowledge of Medical Manager [software] that would be necessary to perform the programmer/analyst position. Nasser took the initiative on his own to grow and learn as much as possible. His initiative to succeed, both on a personal level, as well as wanting our company to be successful, is unmatched in these times. It is rare to find an individual with the technical background who also possesses the necessary relationship skills to deal with

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[5]The CO pointed out at this juncture that before the Employer hired him the Alien was a Manager-in-training/delivery-driver at Marco's Pizza. AF 22.

> both problem clients and staff in order to get the job successfully completed.

AF 24. The Employer's thesis is that the Alien gained the knowledge of Medical Manager software while performing other duties for this company. Id.

Employer's argument is inconsistent with the evidence of record, since the Alien's normal job duties as a Systems Analyst from June 1993 to April 1994 required him to

> [I]nstall computer networks in doctors' offices, configure new technology, do shell programming, troubleshooter, continued technical support in Medical Manager software and SCO Unix. Analyze existing and proposed systems for alterations.

AF 43. The CO clearly considered the training the Alien received in Medical Manager software and SCO Unix before he was promoted to fill the position at issue. As the CO pointed out, the duties of the Alien's present and previous positions appear identical to each other, varying primarily in the added complexity and greater responsibility entailed in the problems with which he is expected to cope in the Employer's service.

While the employer may adopt any qualifications it fancies for the workers it ordinarily hires in its business, 20 CFR § 656.21(b)(5)[6] limits employer's use of restrictive criteria when the employer attempts to impose its requirement for such skills on the hiring of U. S. job applicants when it tests the labor market in the course of applying for alien worker certification to fill the position at issue. For this reason the Employer bears the burden of proving that its hiring qualifications for the position are its actual minimum job requirements, and that it has not in the past hired workers with less training or experience for similar positions, or that it is not feasible to hire workers with less training or experience than this job requires. The Board explained in **Delitizer** that the employer's burden is to establish the "dissimilarity" of the position offered from the job in which the alien gained the required experience, saying, "While the standard itself is straight for-ward, ambiguities may exist concerning the application of the standard." The Board then added that, while comparison of the job duties is relevant, it is not the sole consideration. Observing that a broad range of factors may be weighed, BALCA concluded that 20 CFR § 656.21 (b)(5) gives the CO "broad discretion" to determine the similarity or dissimilarity of the two positions at issue, requiring the CO to state the factors weighed in reaching that finding.

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[6]Although the panel in **ERF, Inc.**, referred to 20 CFR § 656.21(b)(6), this subsection became § 656.21(b)(5) on recodification.

In this case, the CO gave material weight to the Employer's admission that the Alien succeeded in advancing in Employer's business, not only because of his initiative in learning the technical skills but also due to the "relationship skills" that he used in dealing with both "problem clients" and his fellow staff members in handling his work assignments. AF 24.[7] On the other hand, the Employer's restrictive job requirements limit the competition for the position to a worker who gained the requisite experience while working for the Employer as a Systems Analyst. This is not consistent with 20 CFR §§ 656.21(b)(2)(i)(A) and (B).

It follows that Employer's experience requirement violates the Act and regulations, as it is perceived as restraining U. S. candidates other than the Alien from applying for this job. Because 20 CFR § 656.21(b)(5) required the Employer to prove that the qualifications stated in its application represent its actual minimum requirements for the job, we affirm the CO's finding that the Employer failed to establish that it is not feasible to hire a U. S. worker with less than the requirements stated in its application because the CO's conclusion is based on sufficient evidence. **Jackson and Hull Engineers**, 87 INA 547 (Nov. 24, 1987).

Accordingly, the panel concludes that the CO correctly denied certification, and the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER

[7]Nowhere in the Employer's description of the Job to be Performed or the Other Requirements in Form 750A is there any reference to any such concept as "relationship skills," however. Consequently, "relationship skills" must be viewed as an undisclosed qualification that clearly was considered by the Employer in recruiting for this job.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.